
In the Supreme Court of the United States

OCTOBER TERM, 1979

PORTER & DIETSCH, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT*

**BRIEF FOR THE FEDERAL TRADE COMMISSION
IN OPPOSITION**

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OPINIONS BELOW

The opinion (Pet. App. 1a-27a) of the court of appeals is reported at 605 F. 2d 294. The order and opinion of the Federal Trade Commission (Pet. App. 115a-145a) are reported at 90 F.T.C. 770.

JURISDICTION

The judgment of the court of appeals was entered on August 8, 1979 (Pet. App. 1a). The petition for a writ of certiorari was filed on November 6, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Trade Commission properly required petitioners to make certain disclosures in their advertisements for weight-reduction preparations.

(1)

2. Whether the Commission properly prohibited petitioners from making performance claims for certain products unless such claims are fully and completely substantiated by competent scientific studies.

3. Whether the Commission was estopped by other agency proceedings from determining the safety and efficacy of petitioners' product.

4. Whether Commissioners who were absent from oral argument could participate in the Commission's decision in this case.

STATEMENT

1. Petitioner Porter & Dietsch, Inc., markets "X-11" tablets containing phenylpropanolamine hydrochloride ("PPA"), a mild appetite suppressant.¹ It buys the tablets from a manufacturer, packages them along with a leaflet that includes a low-calorie diet, and sells the package as the "X-11 Reducing Plan." The product is advertised and sold throughout the United States and is distributed through retail drug stores and by mail-order (Pet. App. 1a-2a, 43a).²

On complaint and after evidentiary hearings, the Federal Trade Commission found that petitioners had made numerous false statements in advertising X-11 tablets (Pet. App. 123a-129a).³ First, petitioners falsely represented that users of X-11 tablets could lose weight

¹Petitioner William Fraser is president of Porter & Dietsch, Inc., and its sole stockholder. Petitioner Kelly Ketting Furth was its advertising agency, and petitioner Joseph Furth was the account executive responsible for X-11 advertising (Pet. App. 1a-2a).

²See also *Pay 'N Save Corp. v. FTC*, petition for cert. pending, No. 79-1090.

³The Commission's decision adopted in large part the findings and conclusions of the administrative law judge (Pet. App. 37a-115a).

without restricting their normal caloric intake and while continuing to eat foods of their choice.⁴ In reality, however, a person who wishes to lose weight in accordance with petitioners' representations while using X-11 tablets must also maintain a highly restrictive starvation or near-starvation diet and totally abstain from rich foods such as nuts, candy and pastry. Second, petitioners erroneously asserted that X-11 contains a unique ingredient, whereas PPA is an ingredient in a variety of other over-the-counter drug preparations. Third, petitioners falsely proclaimed that scientific evidence demonstrated that substantially all users of X-11 tablets will lose a significant amount of weight, when in fact most users will not experience substantial weight loss (Pet. App. 2a, 123a-129a).

Moreover, the Commission found that petitioners had failed to disclose various material facts in advertising X-11 tablets and that such omissions rendered the advertisements false and deceptive. Thus, petitioners did not report that the typical and ordinary experience of consumers does not parallel the experience reported in testimonials appearing in the advertisements⁵ or that a highly restricted diet is a part of the X-11 plan. Further, the advertisements failed to indicate that persons with high blood pressure, heart disease, diabetes, or thyroid

⁴Typical claims included (Pet. App. 55a):

"WHY STARVE YOURSELF WHILE YOU REDUCE? EAT ... AND LOSE THAT FAT."

"ENJOY EATING THE FOODS YOU CHOSE WHILE YOU LOSE EXCESS, UGLY FAT."

"EAT WHAT YOU WANT—AND SLIM DOWN."

⁵Advertisements frequently contained bold headlines such as "I USED TO WEIGH 160 LBS., NOW I'M DOWN TO 105" and "I LOST 80 LBS" (Pet. App. 46a, 117a).

disease should use X-11 tablets only as directed by a physician. The X-11 boxes carry such a warning, but the Commission concluded that the health hazard is "an important and material fact" that should be disclosed in the advertisements as well (Pet. App. 3a, 129a-131a).

2. In light of these extensive misrepresentations, the Commission ordered petitioners to cease their false and misleading advertising practices and also to make certain affirmative disclosures in the future (Pet. App. 141a-145a). The order prohibits petitioners from representing that their products⁶ will bring about weight loss without dieting or that their products contain "unique ingredients," unless such claims are accurate (*id.* at 142a-143a). Similarly, the order prohibits use of product performance representations not substantiated by competent scientific or medical tests or studies and use of testimonials not indicative of typical user experience (*ibid.*). In addition, in advertising diet remedies such as the X-11 Plan, petitioners are now required to disclose that "Dieting is required" (*id.* at 143a). The Commission also ordered petitioners to warn consumers of the health risks associated with the X-11 Plan in all future advertising.⁷ The order further states that these affir-

⁶The order covers any food, drug, cosmetic, or device (Pet. App. 142a). The Commission concluded that all these products should be covered because petitioner Porter & Dietsch, Inc., is constantly marketing new products, and because as a wholesaler, rather than a manufacturer, it can easily modify its product line (*id.* at 137a-138a).

⁷The advertisements must include the following statement (Pet. App. 143a): "Warning: This product poses a serious health risk for some users. Read the label carefully before using." The court of appeals modified this warning to read: "Warning: This product poses a serious health risk for users with high blood pressure, heart disease, diabetes, or thyroid disease. Read the label carefully before using" (Pet. App. 22a-23a).

mative disclosures must be made in type size equivalent to the largest type size used in the particular printed advertisement (*ibid.*).

3. The court of appeals enforced the order, with minor modifications (Pet. App. 1a-20a). It sustained the Commission's findings that petitioners repeatedly made false statements and omitted material facts in advertising the X-11 pills (Pet. App. 8a-15a). The court rejected petitioners' claims that the Commission's remedial order violated their First Amendment rights: "Because the advertising material subject to the Commission's order was false and misleading * * * it receives no protection from the First Amendment" (Pet. App. 16a).⁸ In particular, the court of appeals approved the Commission's directive that petitioners' future product performance claims be substantiated by competent scientific or medical evidence. Relying on *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965), the court concluded that this requirement was an appropriate "fencing in" provision "justified * * * by the egregiousness of past representations and the propensity of [petitioners] to violate the [Federal Trade Commission] Act" (Pet. App. 19a). Likewise, the court upheld the Commission's decision to impose limited disclosure requirements on petitioners regarding their future advertising of diet products containing PPA. The court stated that these requirements are necessary to prevent deception and to protect public safety (*id.* at 20a-23a). See also note 7, *supra*.

⁸The court also concluded that the order properly encompassed petitioners' representations concerning any food, drug, cosmetic or device and not just X-11 tablets. The court correctly stated that petitioners Fraser and Porter & Dietsch's wholly-owned subsidiaries have violated the Federal Trade Commission Act in the past and that, as wholesalers, petitioners are able to add new product lines with relative ease (Pet. App. 16a-17a).

The court of appeals also rejected petitioners' procedural attacks on the proceedings before the Commission. Referring to the express provisions of 16 C.F.R. 3.52(f), the court held that two Commissioners who did not hear oral argument in this case but who reviewed a transcript of that argument properly participated in the decision (Pet. App. 3a-5a). The court noted that petitioners have "no cognizable interest in the composition of the tribunal that will decide [their] case and [are] entitled only to impartiality in that tribunal" (*id.* at 4a). In addition, the court concluded that the Commission was not collaterally estopped from litigating the issue of petitioners' false and misleading advertising regarding a product that poses a substantial risk to the public. The court explained that the "body of knowledge in the fields of medical and pharmacological science * * * is constantly increasing" and that the prior administrative decisions of the Postal Service upon which petitioners rely involved different distributors of a different, although similar dieting product (*id.* at 7a).

ARGUMENT

This case does not raise any significant issue meriting review by this Court. Petitioners do not directly challenge the concurrent findings of the Commission and the court of appeals that the X-11 advertising campaign was egregiously false and misleading,⁹ and the courts

⁹We note, however, that petitioners seem to suggest (Pet. 6, 7, 13) that the conclusion of the court of appeals and the Commission regarding the misleading nature of petitioners' advertising has somehow been refuted by a recent determination of an FDA panel of experts that PPA may be an effective aid in appetite control. As the court of appeals observed, the modest conclusion, which has not yet been adopted by the FDA and which was made long after the false advertisements in question here, falls far short of substantiating the lavish claims about the X-11 product made by petitioners.

have repeatedly and consistently upheld the Commission's authority to require prior substantiation of advertising claims and disclosure of material information in false advertising cases such as this one. See, e.g., *Jay Norris, Inc. v. FTC*, 598 F. 2d 1244 (2d Cir.), cert. denied, No. 79-434 (Dec. 3, 1979); *Warner-Lambert Co. v. FTC*, 562 F. 2d 749 (D.C. Cir. 1977), cert. denied, 435 U.S. 950 (1978). Moreover, the court of appeals correctly rejected petitioners' procedural claims in an extensive opinion that does not conflict with any decision of this Court or any court of appeals. In short, the court of appeals has properly applied well settled legal principles to the facts of this case, and further review is unwarranted.

1. Petitioners first contend (Pet. 11-13) that the affirmative disclosures required by the Commission effectively constitute a total ban on their advertising, in violation of the First Amendment. The First Amendment, however, affords commercial speech only a limited measure of protection. See, e.g., *Friedman v. Rogers*, 440 U.S. 1, 9-11 & n.9 (1979); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-456 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977). In particular, the government has broad power to restrict potentially false, deceptive, or misleading commercial speech. See, e.g., *Friedman v. Rogers*, *supra*, 440 U.S. at 9; *Bates v. State Bar of Arizona*, *supra*, 433 U.S. at 383-384; *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-772 & n.24 (1976). Thus, as petitioners appear to recognize (Pet. 11-12), there is no doubt that the Commission may constitutionally order affirmative disclosures and warnings in advertising so long as the relief represents a reasonable method of correcting past deceptions and preventing future ones. *National Society of Professional Engineers v. United States*, 435 U.S. 679,

698 (1978); *Bates v. State Bar of Arizona*, *supra*, 433 U.S. at 384; *Virginia Citizens Consumer Council*, *supra*, 425 U.S. at 772 n.24; *National Comm'n on Egg Nutrition v. FTC*, 570 F. 2d 157, 160-162 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978); *Warner-Lambert Co. v. FTC*, *supra*, 562 F. 2d at 758-763.

It is thus apparent that the affirmative warnings ordered here are well within constitutional limits. Both the court of appeals and the Commission found that petitioners had repeatedly made false and misleading statements about the efficacy and safety of their product. The dieting and health disclosures formulated by the Commission in direct response to those deceptions are an appropriate means of avoiding similarly misleading advertising in the future. *National Comm'n on Egg Nutrition v. FTC*, *supra*; *Warner-Lambert Co. v. FTC*, *supra*; *J.B. Williams Co. v. FTC*, 381 F. 2d 884 (6th Cir. 1967); *Ward Laboratories, Inc. v. FTC*, 276 F. 2d 952 (2d Cir.), cert. denied, 364 U.S. 827 (1960). Moreover, requiring the disclosure and warning to be in the same type size as the largest type used in the particular advertisement ensures that the public will be fully protected and that petitioners, who have previously gone to the limits of the law and beyond (Pet. App. 17a), cannot nullify the disclosure requirement by hiding the dieting and health warnings in the remainder of the advertisement. See *National Comm'n on Egg Nutrition v. FTC*, *supra*, 570 F. 2d at 160; *Warner-Lambert Co. v.*

FTC, *supra*, 562 F. 2d at 763.¹⁰ That these disclosure requirements may adversely affect petitioners' future sales simply reflects the materiality of those disclosures and the harm to the public previously caused by petitioners' misleading and deceptive sales methods.

2. Petitioners' claims (Pet. 13-14) regarding the substantiation requirement are also without merit. The Commission's order prohibits petitioners from making product performance claims unless those claims are

¹⁰Contrary to petitioners' claim (Pet. 11), the decision in this case does not conflict with either *National Comm'n on Egg Nutrition*, *supra*, or *Warner-Lambert Co.*, *supra*. In the former case, the Seventh Circuit approved a Commission order that required certain disclosures to be made "clearly and conspicuously." 570 F. 2d at 160. The Commission order in that case did not specify what "clearly and conspicuously" meant in terms of type size and the court of appeals therefore had no occasion to consider that issue. Here, the Commission has quantified the "clearly and conspicuously" standard (Pet. App. 144a) and the Seventh Circuit has sustained the print size requirement. See also *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (the Court does not sit to resolve alleged intra-circuit conflicts).

Similarly, in *Warner-Lambert Co.*, the court of appeals upheld a Commission order requiring that certain disclosures be made "in type size at least as large as * * * the principle portion of the text" and "separated from the text so that it can be readily noticed." 562 F. 2d at 763. The court did not suggest that a larger type requirement would be inappropriate in that or any other case. To the contrary, the opinion elsewhere states that stricter requirements "might be called for in an egregious case of deliberate deception, but this is not one." *Ibid.* Here, in contrast, the court of appeals specifically observed that the Commission's order is "justified in this case by the egregiousness of past representations and the propensity of [petitioners] to violate the Act" (Pet. App. 19a). Moreover, there is a substantial question whether the order in this case is in fact more strict than that involved in *Warner-Lambert*, since although the print size requirement here may be somewhat larger, there is no requirement that the disclosures or warnings be conspicuously separated from the text of the advertisement.

substantiated by competent scientific tests or studies (Pet. App. 142a). The order does not, however, "require petitioners to conduct needless tests" (Pet. 13). To the extent that petitioners modify their claims about the X-11 Plan so that existing, competent tests or studies support those claims, petitioners will not have to conduct any additional tests; the terms of the order will be satisfied if they gather existing documentation that is sufficient to support their modified claims and make it available to the Commission for inspection. Petitioners will be required to conduct their own studies only if they wish to make claims that are not supported by any existing studies of a particular product¹¹ or if they decide to market products for which efficacy and safety data have not yet been developed.

Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, prohibits all advertisers from making performance representations that are unsubstantiated. See e.g., *Jay Norris, Inc. v. FTC*, *supra*, 598 F. 2d at 1250. And where, as here, an advertiser has violated the Act in this regard, the courts of appeals have repeatedly concluded that the Commission may impose a substantiation requirement on the advertiser, such as that at issue here. See, e.g., *Jay Norris, Inc. v. FTC*, *supra*; *Tashof v. FTC*, 437 F. 2d 707, 715 (D.C. Cir. 1970). As this Court explained in *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965):

We think it reasonable for the Commission to frame its order broadly enough to prevent respondents from engaging in similarly illegal practices in future

¹¹The recent FDA study on which petitioners rely (see note 9, *supra*) simply does not substantiate petitioners' claims that the X-11 pills will result in weight loss without dieting or that substantially all users of the X-11 pill will lose weight. See Pet. App. 12a n.6.

advertisements. As was said in *Federal Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470, 473: "[t]he Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past." Having been caught violating the Act, respondents "must expect some fencing in." *Federal Trade Comm'n v. National Lead Co.*, 352 U.S. 419, 431.

See also *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611-613 (1946) ("The Commission has wide discretion in its choice of a remedy * * *").

3. Petitioners further contend (Pet. 14-16) that principles of collateral estoppel preclude the FTC from litigating the efficacy and safety of their product. Petitioners primarily rely on a Postal Service decision regarding another advertiser's dieting product similar to that marketed by petitioners. See *In re Hanover House and Romar Sales Corp.*, Post. Serv. Docket Nos. 2/143 and 2/149 (1975) (J.A. 261-274).¹² But that proceeding involved substantially different advertising claims¹³ and

¹²Petitioners also point to the Commission's earlier decision in *In re Allegheny Pharmacal Corp.*, 75 F.T.C. 990 (1969). The court of appeals correctly stated that *Allegheny* "involved issues different from those in the case at bar" (Pet. App. 7a). Further, the Commission specifically dismissed that proceeding without a final decision on the merits and without prejudice to further Commission action (75 F.T.C. at 1036). Such a decision does not constitute a basis for estoppel. See, e.g., *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326 (1955); *C.G. Conn v. NLRB*, 108 F. 2d 390, 392-393 (7th Cir. 1939); K. Davis, *Administrative Law Text* § (3d ed. 1972).

¹³The advertisers in the Postal Service proceeding claimed that their product (Hungrex) would "banish hunger pains," would "cause calorie intake to go down," and would "help the user to start losing weight the first day" (J.A. 266-267). These assertions are far more modest than petitioners' claims that X-11 would result in substantial weight loss for all users and that users could eat anything that they wished to eat and still lose weight.

was brought under a significantly different statute.¹⁴ In other words, neither the same issues nor the same facts that are the subject of this litigation were determined in the prior administrative hearing. Accordingly, the Commission was not collaterally estopped from proceeding against petitioners. See, e.g., *Montana v. United States*, 440 U.S. 147, 155-162 (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326 (1955); *Brandenfels v. Day*, 315 F. 2d 375, 378 (D.C. Cir.), cert. denied, 375 U.S. 824 (1963); *United States v. 42 Jars, More or Less*, 264 F. 2d 666, 668-669 (3d Cir. 1959).¹⁵

4. Finally, petitioners erroneously argue (Pet. 16-18) that two of the five Commissioners should not have participated in the decision of this case. Although Commissioner Dole was on leave and Chairman Pertschuk was not yet appointed at the time of oral argument in this case, both were active Commission members long before the Commission's decision was

¹⁴The Postal Service proceedings were based on 39 U.S.C. 3005, which provides that the Postal Service may prohibit the use of the mails to "conduct[] a scheme or device for obtaining money or property * * * by means of false representations * * *." Section 5(a) of the Federal Trade Commission Act, on the other hand, makes all "deceptive or unfair acts" unlawful (15 U.S.C. 45(a)), and thus encompasses a broader category of activities than does 39 U.S.C. 3005. See *Brandenfels v. Day*, 316 F. 2d 375, 378 (D.C. Cir.), cert. denied, 375 U.S. 824 (1963).

¹⁵Furthermore, even if the Postal Service proceeding did involve the same legal issue and the same advertising claims, the government is not precluded from relitigating in good faith an issue of public health dependent upon the "constantly increasing" "body of knowledge in the fields of medical and pharmacological science" (Pet. App. 7a). Cf. *FTC v. Raladam Co.*, 316 U.S. 149, 150-151 (1942); *Montana v. United States*, *supra*, 440 U.S. at 162-163.

rendered. Their participation was therefore proper under the Commission's rules, which expressly provide that Commissioners who are absent from oral argument may participate in the decision of the case where, as here, "the oral argument is stenographically reported" (16 C.F.R. 3.52(f); Pet. App. 3a-5a). Furthermore, it is well settled as a matter of both due process and administrative law that "a member of an administrative agency who did not hear oral argument may nevertheless participate in the decision where he has the benefit of the record before him." *Gearhart & Otis, Inc. v. SEC*, 348 F. 2d 798, 802 (D.C. Cir. 1965); see, e.g., *Au Yi Lau v. INS*, 555 F. 2d 1036, 1042 (D.C. Cir. 1977); *Arthur Lipper Corp. v. SEC*, 547 F. 2d 171, 182-183 n.8 (2d Cir. 1976), cert. denied, 434 U.S. 1009 (1978); cf. *FCC v. WJR*, 337 U.S. 265, 274-277 (1949) (no due process right to oral argument).¹⁶ That principle obtains even where a majority of the participating members become members after oral argument. See, e.g., *Arthur Lipper Corp. v. SEC*, *supra*; *Au Yi Lau v. INS*, *supra*.

¹⁶Petitioners' reliance on *WIBC, Inc. v. FCC*, 259 F. 2d 941 (D.C. Cir.), cert. denied, 358 U.S. 920 (1958), is misplaced. In that case, oral argument was guaranteed by statute, whereas here the Commission's rules specifically permit a member to participate even though he has not heard oral argument. In any event, the District of Columbia Circuit has subsequently limited *WIBC, Inc.* to its peculiar facts. See e.g., *Gearhart & Otis, Inc. v. SEC*, *supra*, 348 F. 2d at 802 n.14.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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